



TOWN OF WAKEFIELD, NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT

2 HIGH STREET

SANBORNVILLE NH 03872

TELEPHONE: (603) 522-6205 X 308 FAX: (603) 522-2295

LANDUSECODEDEPT@WAKEFIELDNH.COM

Notice of Decision

ZBA Appeals of Administrative Decisions

Applicant: Whittier Communications, Inc. ("Whittier")

Date: September 19, 2023

Property Locations: Tax Maps 9-113, 4870 Province Lake Road & Tax Map 92-34 Province Lake Road.

Subject: Whittier Communications, Inc. appeals two decisions of the Wakefield Planning Board, issued on October 6, 2022, granting major site plan applications to Vertex Tower Assets, LLC, ("Vertex") seeking to construct and operate cell towers on the subject property.

Findings:

1. Whittier Communications, Inc. is appealing the Wakefield Planning Board's October 6, 2022, decisions to grant major site plan applications for Vertex Tower Assets, LLC, alleging the applicant failed to meet the standards outlined by the Town ordinance Article 24, and as such, the Planning Board's decision was unlawful or unreasonable.
2. The ZBA held a hearing on this appeal on September 14, 2023.
3. The ZBA heard testimony from Whittier's attorney, Vertex's attorney, and the public.
4. The ZBA was provided with documentation from the Planning Board's decision.
5. Mr. Stewart articulated that the question before the ZBA is whether the Planning Board acted lawfully and reasonably in granting Vertex's applications.

Decision:

Before the Zoning Board of Adjustment ("ZBA") are two appeals of decisions made by the Wakefield Planning Board, dated October 6, 2022. The appeals were filed by Whittier Communications, Inc ("Whittier"). The Planning Board approved Vertex Tower Assets, LLC ("Vertex") major site plan applications seeking to construct and operate cell towers at both properties, subject to certain conditions. See October 6, 2022 decision. For the reasons outlined below, the ZBA voted 5-0 to deny both Whittier appeals.

The first appeal involves property located at 4870 Province Lake Road ("Province Lake Tower"). The second appeal involves property located at Tax Map 92-34 on Province Lake Road identified as Savannahwood ("Savannahwood Tower"). Whittier owns a cell tower which is 2.25 miles and 1.9 miles away from the Vertex towers. On April 22, 2022, the Planning Board reviewed the Vertex applications. At that time the Planning Board voted to deny the applications, finding that the Whittier Tower was "in existence" for the purpose of the ordinance. See April 21, 2022, PB decision. (April Decision). Vertex appealed that decision to the ZBA, and on June 23, 2022, the ZBA found that Whittier's tower was not in existence and remanded the matter back to the Planning Board. See ZBA Decision June 23, 2022. ("June Decision"). Sometime after the June Decision, and before the October 6, 2022, while the Vertex application was still pending, Whittier completed construction of its Tower. On October 6, 2022, the Planning Board held another hearing on the Vertex applications and voted to approve both applications.

Whittier timely appealed both decisions of the Planning Board to the ZBA on November 4, 2022. Due to procedural issues, the ZBA did not hold a substantive hearing on the merits of Whittier's appeal until September 14, 2023.

During the hearing both Whittier and Vertex were given an opportunity to address the board. Pursuant to RSA 674:33, the ZBA has the power to "[H]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16."

Whittier's primary argument is that the Planning Board acted unreasonably and unlawfully, when the Planning Board granted the Vertex applications and found that Vertex had met the criteria outlined in Article 24 of the Wakefield Town Ordinance, specifically, Article 24, A(4), E(5) and F. Whittier argues that in the April Decision the Planning Board denied the Vertex applications, in part due to its finding that the Whittier Tower was in existence. The April Decision was appealed by Vertex to the ZBA, and in the June Decision the ZBA held that the Whittier Tower was not in existence and remanded the decision back to the Planning Board consistent with that decision. Whittier argues that between the April Decision when the Planning Board denied the applications, and the October 6, 2022, Decision, when the Planning Board granted the applications, Vertex presented no new evidence which supported

a reversal of the Planning Board's April Decision, and the only change in circumstance was that Whittier completed construction of its tower, so it was now "in existence."

Alternatively, Vertex argues that they presented sufficient evidence to meet the requirements outlined in the zoning ordinance, and the ZBA should affirm the Planning Board's October 6, 2022, decision to approve both applications for major site plans.

During the hearing ZBA members raised the issue of coverage at the proposed locations, and questioned Whittier as to whether sufficient coverage exists. Whittier responded by suggesting the Board should wait until a carrier is up and running on the Whittier Tower, and then reassess to see if there are actually gaps in coverage. Vertex countered that argument by suggesting the studies presented to the Planning Board and ZBA demonstrate a need for coverage, even if the Whittier Tower is in existence.

Having reviewed the October 6, 2022, decision of the Planning Board, and discussing the appropriate standard, a motion was made by George Frothingham and seconded by John Crowell to deny both appeals by Whittier. The ZBA voted 5-0 in favor of denying the appeals. The ZBA found that the Planning Board acted lawfully and reasonably, and that Whittier failed to meet its burden to demonstrate the Planning Board committed reversible error.

In making its decision, the ZBA relies on the meeting minutes of the Planning Board dated September 1, 2022, and October 6, 2022. The ZBA also incorporates the minutes (upon approval) from the September 14, 2023, appeal hearing in support of this decision. Finally, the ZBA relied on the information presented during the first Planning Board appeal.

The ZBA finds that even if the Whittier Tower is "existing" as that term is used in the Town ordinance, Vertex presented sufficient evidence in support of its applications. The Board also found that the proposed Vertex Towers would not violate Article 24 A(4) as the rural character of the area is maintained. For those reasons, and the reasons provided on the record, the ZBA denies both appeal applications of Whittier.



Don Stewart, Chair, Zoning Board of Adjustment